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MANN BRACKEN, LLC; DOUG MANN; EDWARD REILLY

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ZENAIDA E. QUICHO, individually and
on behalf of all others similarly situated,

CASE NO. C 07 3478 BZ

Plaintiff,

**DEFENDANTS' BRIEF IN SUPPORT
OF APPROVING THE
SETTLEMENT AND ORDERING
THE DISMISSAL**

v.

MANN BRACKEN, LLC; DOUG
MANN; EDWARD REILLY,

[F.R.C.P. 23(e)(1)(A)]

Defendants.

DATE: December 19, 2007

TIME: 10:00 a.m.

/ DEPT.: Courtroom "G"

Importantly in this action, the class was never certified. On or about November 15, 2007, the parties filed a Joint Request to Dismiss this Action with Prejudice as to Plaintiff and Without Prejudice to the Putative Class. On or about November 15, 2007, the Court ordered the parties to file briefs in support of approving the settlement and ordering the dismissal addressing the issues set forth in Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401, 1408 (9th Cir. 1989). Defendants respectfully submit that the Court does not have to approve the instant settlement.

The Court is not obligated to approve a settlement in which the class was not certified. See F.R.C.P. 23(e)(1)(A). Rule 23(e)(1)(A) clearly states: "The court must

1 approve any settlement, voluntary dismissal, or compromise of the claims, issues, or
 2 defenses of a **certified** class.” F.R.C.P. 23(e)(1)(A). [emphasis added]


3 The Advisory Commission Notes regarding this 2003 amendment to Rule 23(e)
 4 make this additionally clear: “The new rule **requires approval only if** the claims,
 5 issues, or defenses of a **certified class** are resolved by a settlement, voluntary
 6 dismissal, or compromise.” See Advisory Commission Notes. [emphasis added]

7 Although it did not involve a certified class, the factors in Diaz do not apply to
 8 the instant action. This is because Diaz is a 1989 case that pre-dated the 2003
 9 amendment to F.R.C.P. 23(e)(1)(A), and is not the most updated law. The parties
 10 acknowledge that they mistakenly cited to Diaz in the Joint Request to Dismiss this
 11 Action with Prejudice as to Plaintiff and Without Prejudice to the Putative Class
 12 when the governing law is clearly Federal Rule of Civil Procedure 23(e)(1)(A).

13 Defendants are not addressing the issues set forth in Diaz because Defendants
 14 believe that Diaz does not apply to the instant case. However, if the Court disagrees,
 15 Defendants will gladly submit further briefing and/or be prepared to discuss these
 16 matters at the time of the hearing.

17 Defendants respectfully submit that the Court does not have to approve the
 18 instant settlement, and request the Court to reconsider its Order requiring briefing on
 19 this issue and scheduling a hearing.

20
 21 DATED: November 30, 2007 LEWIS BRISBOIS BISGAARD & SMITH LLP

22
 23 By 
 24 Stephen H. Turner
 25 Alisha M. Lee
 26 Attorneys for Defendants
 27 MANN BRACKEN, LLC; DOUG MANN;
 28 EDWARD REILLY

CERTIFICATE OF SERVICE

Zenaida E. Quicho vs. Mann Bracken, LLC, et al.
U.S.D.C. Case No. CASE NO. C 07 3478 BZ

I certify that on the 30th day of November 2007, I electronically transmitted the foregoing document **DEFENDANTS' BRIEF IN SUPPORT OF APPROVING THE SETTLEMENT AND ORDERING THE DISMISSAL** to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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